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In the
Supreme Court of the United States

OCTOBER TERM, 1987

H-CHH ASSOCIATES, doing business as PLAZA PASADENA,
and HAHN PROPERTY MANAGEMENT CORPORATION,
Petitioners,

vs.

CITIZENS FOR REPRESENTATIVE GOVERNMENT, doing business
as PASADENA CITIZENS FOR REPRESENTATIVE GOVERNMENT,
DALE L. GRONEMEIER, CHRISTOPHER A. SUTTON, and
OZRO ANDERSON,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA
COURT OF APPEAL, SECOND DISTRICT, DIVISION ONE

**Motion for Leave to File Brief *Amici Curiae* and Brief
of the International Council of Shopping Centers,
Inc., and California Business Properties Association
as *Amici Curiae*, in Support of the Petitioners**

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TABLE OF CONTENTS

Motion of International Council of Shopping Centers, Inc., and California Business Properties Association for Leave to file Brief <i>Amici Curiae</i>	1
Brief of the International Council of Shopping Centers, Inc., and California Business Properties Association as <i>Amici Curiae</i> , in Support of the Petitioners	3
Interest of the <i>Amici Curiae</i>	3
Facts	4
ARGUMENT	
POINT I—The issues in this case are of great importance to shopping centers in California and their customers	4
POINT II—The Pruneyard case should be reconsidered in light of developments since 1980	7
Conclusion	9
APPENDIX A—Extract from the Wisconsin Shopping Center Survey	1a
APPENDIX B—Extract from: <i>Sacramento Union</i> , Monday, August 8, 1984	8a

TABLE OF AUTHORITIES

Cases Cited:

<i>Alderwood Associates v. Washington Environmental Council</i> , 96 Wash 2d 230, 635 P. 2d 108 (1981)	7
<i>Batchelder v. Allied Stores International, Inc., et al.</i> 383 Mass. 83, 445 N.E.2d 590 (1983)	7
<i>Californians Against Waste Campaign Committee et al. v. H & K Associates, Inc. et al.</i> , Superior Ct. Sacramento Cty., No. 300294 (12/15/81)	4

<i>Cologne et al. v. Westfarms Associates et al.</i> , Superior Ct. Hartford-New Britain Dist., No. 274171 (8/13/83), <i>modified on appeal</i> , 192 Conn. 48, 469 A.2d 1201 (1984)	6, 7
<i>EMI Santa Rosa Limited Partnership v. Sonoma County Nuclear Freeze Campaign, etc. et al.</i> , Superior Ct. Sonoma Cty. No. 133547 (6/6/84)	4
<i>First English Evangelical Lutheran Church of Glendale v. County of Los Angeles</i> , ___U.S. ___, 107 S.Ct. 2378 (1987)	8
<i>Horton Plaza Associates v. Playing for Real Theatre</i> , 184 Cal. App. 3d 10 (1986), <i>appeal denied, opinion de-published</i>	4
<i>Jacobs v. Major</i> , 132 Wisc. 2d 82, 407 N.W. 2d 832 (1987)	7
<i>Noles et al. v. Northridge Fashion Center, Inc. et al.</i> , Calif. Ct. of Appeal, 2d Dist., No. 61058 (9/29/82)	4
<i>Nollan v. California Coastal Commission</i> , ___U.S. ___, 107 S.Ct. 3141 (1987)	8
<i>North Carolina v. Felmet</i> , 302 N.C. 173, 273 S.E. 2d 708 (1981)	7
<i>Pruneyard Shopping Center et al. v. Robins et al.</i> , 447 U.S. 74 (1980)	4, 5, 7
<i>SHAD Alliance et al. v. Smith Haven Mall</i> , 66 N.Y. 2d 496, 488 N.E. 2d 1211 (1985)	7
<i>Western Pennsylvania Socialist Workers 1982 Campaign et al. v. Connecticut General Life Insurance Company</i> , ___Pa. ___, 515 A. 2d 1331 (1986)	7
<i>Woodland v. Michigan Citizens Lobby</i> , 423 Mich. 188, 378 N.W. 2d 337 (1985)	7

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**Motion of International Council of Shopping Centers,
Inc., and California Business Properties Association
for Leave to File Brief *Amici Curiae***

Pursuant to Rule 42(3) of the Rules of this Court, International Council of Shopping Centers, Inc. (ICSC), and California Business Properties Association (CBPA) respectfully move the Court for leave to file a brief *amici curiae* in the above entitled case. Counsel for petitioners has granted its consent and its letter of consent has been filed with the Office of the Clerk of this Court. Counsel for respondents has not replied to movant's letter requesting consent.

ICSC and CBPA are trade organizations representing shopping center owners, developers, retailers, investors, property managers, and all others having a professional or business interest in the shopping center industry not only in California, but throughout the country. The members of these organizations are concerned with the diminution of private property rights. The issues presented in the above

entitled case bear a direct relationship to that concern. Public access to shopping center property, for purposes other than its intended use, continues to be argued and litigated and the ruling of this case creates additional burdens to *all* members of the shopping center industry and to its customers and patrons.

ICSC and CBPA each serve as a clearinghouse for information in the areas of shopping center development and operation which information will be relevant to the disposition of this case and will provide this Court with the overall shopping center industry perspective rather than just one particular instance.

For the foregoing reasons of interest, resulting impact, relevancy, and additional available information, ICSC and CBPA respectfully move that this Court grant leave to file a brief *amici curiae*, which brief is included herein.

DATED: February 25, 1988

Respectfully submitted,

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**Brief of the International Council of Shopping Centers,
Inc., and California Business Properties Association
as *Amici Curiae*, in Support of the Petitioners**

Interest of the *Amici Curiae*

The International Council of Shopping Centers, Inc. (ICSC), is the trade association of the shopping center industry. Members of the ICSC, consisting of shopping center developers, retailers, investors, managers and all others having a professional or business interest in the shopping center industry, are engaged in the day-to-day activities of designing, planning, constructing, managing, financing, developing, leasing and owning shopping centers and their retail stores. ICSC has approximately 24,000 members, representing a large majority of the over 28,500 shopping centers in the United States. ICSC has over 4,000 members in the state of California, representing most of the 3,320 shopping centers in California, many of which are directly affected by the decision below.

The California Business Properties Association (CBPA) represents in excess of 4,000 members, all in California, many of whom are involved with shopping centers as developers, retailers, investors, etc., as described above for ICSC. Many of CBPA's members own or operate shopping centers directly affected by the decision below.

Facts

ICSC and CBPA refer the Court to the Brief of the Petitioners for a statement of the facts of this case, and that statement is incorporated herein by reference.

ARGUMENT

POINT I

The issues in this case are of great importance to shopping centers in California and their customers.

After this Court's decision in the *Pruneyard* case,¹ California shopping centers have been struggling to comply with the requirements to allow solicitations for political purposes under reasonable rules and regulations. This has resulted in a great deal of confusion and litigation concerning such matters as the right to conduct a theatrical representation of the war in Central America,² whether the Hare Krishna could conduct their customary activities in a shopping center,³ the radius from a table that solicitors must stay within,⁴ and whether petitioners can sell literature.⁵ These

¹ *Pruneyard Shopping Center et al. v. Robins et al.*, 447 U.S. 74 (1980).

² *Horton Plaza Associates v. Playing for Real Theatre*, 184 Cal. App. 3d 10 (1986), *appeal denied, opinion de-published*.

³ *Noles et al. v. Northridge Fashion Center, Inc. et al.*, Calif. Ct. of Appeal, 2d Dist., No. 61058 (9/29/82).

⁴ *Californians Against Waste Campaign Committee et al. v. H & K Associates, Inc. et al.*, Superior Ct. Sacramento Cty., No. 300294 (12/15/81).

⁵ *EMI Santa Rosa Limited Partnership v. Sonoma County Nuclear Freeze Campaign, etc. et al.*, Superior Ct. Sonoma Cty. No. 133547 (6/6/84).

are but a few examples of the many kinds of litigation that have beset malls in California.

The absence of clear guidance is of great importance, not only to shopping center owners and managers, but to the customers of the centers. ICSC estimates that approximately 13 million individuals visit a regional mall in California every month. They come there to shop, and many object to unwanted interference from political solicitors.

The Wisconsin Survey Research Laboratory of the University of Wisconsin conducted a public opinion survey of Wisconsin residents on this issue, sponsored by ICSC. The survey found that 67% of those surveyed believed special interest (political) groups should not be allowed to ask for signatures on petitions in shopping centers. 38% said they would avoid that part of a center where a group (ranging from Boy Scouts to anti- or pro-abortion) was conducting activities; 24% would reduce their shopping time in such an event; and 23% would find another shopping center. This amounts to a substantial interference with the business of a shopping center. Polls in other parts of the country showed similar results. (An extract from the Wisconsin survey is annexed hereto as Appendix A.)

The court below noted the "dearth of authority which provides any form of guidance as to the type of regulation which is valid."⁶ The court below then proceeded to develop its own criteria for these regulations. ICSC and CBPA submit that there is a substantial question as to the validity of the "least restrictive means" criterion adopted by the court below. This Court in its *Pruneyard* decision made it clear that its finding of no taking under the Fifth and Fourteenth amendments to the U.S. Constitution was based on the decision of the California Supreme Court allowing restrictions on expressive activity by regulations "that will minimize any interference with [the shopping center's] commercial functions."⁷

⁶ Appendix A to Petitioner's brief, p. A20.

⁷ *Pruneyard Shopping Center et al. v. Robins et al.*, *supra*, note 1 at p. 83.

This standard requires a balancing of the California constitutional protections for speech against the shopping center owner's rights to protect its business (and its tenants' businesses) from interference. This Court required an even-handed balancing of these two competing interests. The standard formulated by the court below, however, requiring the least restrictive means, weights the balance in favor of the speech rights. This appears to be inconsistent with the standard approved by this Court in *Pruneyard* which requires, at the minimum, an even-handed balance.

If there is any bias, it would appear to be in favor of the shopping center by the use of the word "minimize" to describe the permissible interference with commercial functions. If the court had said "reasonable interference" or "acceptable interference," that would imply an even balancing. The use of the term "minimum interference" indicates that any weighting of the balance should be in favor of the shopping center because of the unusual intrusion into its rights by California law. The standard adopted by the court below is directly contrary to the minimum interference concept approved by this Court.

The instant case illustrates the need for Supreme Court review of the applicable criteria for rules and regulations which minimize interference with commercial functions of a shopping center. The court below, in applying its "least restrictive" rule, required objective regulations and eliminated all judgmental factors because they presented a potential for improper, content-related restrictions. The notion that objective rules can be drafted to cover all possible situations is, we submit, an impossible goal. If it could be achieved, the result would be a list of regulations so voluminous and cumbersome as to be difficult to comprehend and apply.

Examples of events which could not have been anticipated but have occurred in shopping centers include a riot protesting a threatened Ku Klux Klan registration drive⁸ and an

⁸ *Cologne et al. v. Westfarms Associates et al.*, Superior Ct. Hartford-New Britain Dist., No. 274171 (8/13/83), modified on appeal, 192 Conn. 48, 469 A.2d 1201 (1984).

"anti-war dance" with a simulated death by nuclear war.⁹ These unexpected events resulted in a substantial interference with the business of the shopping center on the days they occurred.

POINT II

The *Pruneyard* case should be reconsidered in light of developments since 1980.

In the eight years since the Supreme Court decided the *Pruneyard* case, litigation has occurred throughout the country on this issue. ICSC and CBPA respectfully submit that this extensive litigation requires reconsideration by the Supreme Court of its original decision.

In *Pruneyard*, this Court said that the State of California could require public access to a shopping center for political petitioning under reasonable rules and regulations without violating the center owner's constitutional rights.¹⁰ Since that decision, this issue has been considered by the highest courts of eight states. Six states specifically rejected the California concept.¹¹ Two states followed California but only to a limited extent.¹²

The six high state courts which rejected the *Pruneyard* rule basically took the position that the purpose of a constitution is to prescribe the relationship of government to

⁹ *Jacobs v. Major*, 132 Wisc. 2d 82, 407 N.W. 2d 832 (1987).

¹⁰ *Pruneyard Shopping Center et al. v. Robins et al.*, *supra*.

¹¹ *North Carolina v. Felmet*, 302 N.C. 173, 273 S.E. 2d 708 (1981); *Cologne et al. v. Westfarms Associates et al.*, 192 Conn. 48, 469 A.2d 1201 (1984); *Woodland v. Michigan Citizens Lobby*, 423 Mich. 188, 378 N.W. 2d 337 (1985); *SHAD Alliance et al. v. Smith Haven Mall*, 66 N.Y. 2d 496, 488 N.E. 2d 1211 (1985); *Western Pennsylvania Socialist Workers 1982 Campaign et al. v. Connecticut General Life Insurance Company*, ___ Pa. ___, 515 A. 2d 1331 (1986); *Jacobs v. Major*, *supra*.

¹² *Alderwood Associates v. Washington Environmental Council*, 96 Wash 2d 230, 635 P. 2d 108 (1981), solicitation of signatures on initiative petitions only; *Batchelder v. Allied Stores International, Inc., et al.* 383 Mass. 83, 445 N.E.2d 590 (1983), solicitation of signatures on nominating petitions only.

the people, not relationships among individuals. California, by permitting its state constitution to be used to allow some individuals to assert rights against others, has adopted an unusual constitutional theory.

Although the facts presented in *Pruneyard* were simply a few students soliciting petitions, this has now mushroomed into a substantial interference with the business of shopping centers. As noted in petitioners' brief, the mere implementation of the rules and regulations prescribed by the court below imposes a substantial burden on a shopping center. It also should be noted that the few students have become many different groups, including some that use paid solicitors to obtain signatures in shopping centers.¹³

Shopping center developers have created valuable properties. By forcing centers to make these properties available to certain groups, for their own purposes unrelated to the business of the center, California has taken property without compensation within the meaning of recent decisions of this Court.¹⁴

¹³ *Sacramento Union*, August 6, 1984, p. A1-2. (Extract annexed as Appendix B).

¹⁴ *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, ___U.S. ___, 107 S.Ct. 2378 (1987); *Nollan v. California Coastal Commission*, ___U.S. ___, 107 S.Ct. 3141 (1987).

CONCLUSION

For these reasons, the petition for certiorari raises substantial questions of federal law which require review by this Court.

Respectfully submitted,

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Appendix A

Extract from the Wisconsin Shopping Center Survey

University of Wisconsin-Extension

Wisconsin Survey Research Laboratory

March 18, 1985

THE WISCONSIN SHOPPING CENTER SURVEY

Introduction

The data presented in this report were obtained from 956 telephone interviews completed with randomly selected adults throughout the State of Wisconsin during the last two weeks of January, 1985. The research, sponsored by the International Council of Shopping Centers, was carried out by the University of Wisconsin's Survey Research Laboratory.

Section A contains: 1) the actual questions as they were asked during the interviews, 2) percentaged frequency distributions of all coded responses to each question, and 3) general conclusions that may be derived from the statistical findings.

Section B describes in some detail the methodological procedures used in this research, with emphasis on the development of the interview schedule and interviewing requirements. All aspects of the shopping center survey were designed to meet or exceed the highest standards of survey research.

A description of the random digit dialing telephone sample design used in the research, and a final response rate report comprise Section C.

A copy of the interview schedule used in the survey is appended to the report.

SECTION A. BASIC RESULTS AND CONCLUSIONS

THE WISCONSIN SHOPPING CENTER SURVEY

Statistical Validity and Sampling Error

Given the care exercised in the selection of the sample and high response rate, the number of completed interviews upon which these findings are based represents a statistically valid survey—within known limits of sampling error—of the attitudes and behavior of the adult residents of Wisconsin.

Any sample survey will contain sampling error. While it is certainly true that the smaller the sample size, the larger the sampling error, it is also true that the degree to which error is present in a survey is dependent on many things in addition to sample size. Assuming, however, that the survey is carefully done (as was the Wisconsin shopping center survey), the statistical margin for error for an operation yielding 956 completed interviews is approximately plus or minus 3 percentage points at the .95 level of significance.

For example, this survey found that 44 percent of the respondents believe management should have the right to determine which groups are allowed in the center (question 18). A sampling error of ± 3 percentage points at the .95 level of significance indicates that 95 percent of the time no more than 47 percent and no less than 41 percent of the respondents believe that management should have this right.

The statement that a given relationship reported in the data is “statistically significant” means that it cannot reasonably be attributed to chance variations due to sampling error. Thus, in the above example from question 18, the difference is statistically significant between the percentage of respondents who believe the centers should be open to all (37 percent), and those who feel management should have the right to determine which groups use the centers (44 percent). In this sense, it is statistically “valid” to

conclude that Wisconsin adults are somewhat more likely to support management determination of shopping center use (as measured by question 18) than to favor an open policy for all special interest groups.

Basic Results and Conclusion

As presented below, the exact question asked during the interview is reproduced above the percentaged frequency distribution of responses to that question. The absolute number of cases (i.e., interviews) upon which each distribution is based is given at the bottom of that distribution. All percentages shown here were computed after the removal of "not ascertained" entries and were rounded to the nearest whole number.

Q-1. In this survey, we define a shopping center as a group of stores anchored by a department store, supermarket, or discount store, and providing off-street parking. In a typical *month*, how many times—if ever—do you visit a shopping center?

<u>Sex</u>			<u>Number of visits to a shopping center in a typical month.</u>
<u>Female</u>	<u>Male</u>	<u>All</u>	
7%	8%	7%	Less than once a month
15	16	15	One
15	16	15	Two
8	9	9	Three
18	19	18	Four
13	18	15	Five to seven
11	9	10	Eight to ten
13	5	11	Eleven or more
100%	100%	100%	Total
567	383	945	Number of cases

About one-half of all adults in Wisconsin visit shopping centers more than three times a month, and one out of every ten adults goes there more than ten times each month. Not surprisingly, women go to centers more often

than men, but even about one-third of the men visit shopping centers at least five times a month.*

* * *

Q-6. Do you feel that special interest groups—that is, groups on one side or the other of some public issue—should or should not be allowed to present their views publicly in shopping centers?

Sex			Special Interest Groups:
Female	Male	All	Discuss views
41%	34%	39%	Should be allowed
47	56	51	Should not be allowed
12	9	10	Depends/Don't know
100%	99%	100%	Total
570~	384	954	Number of cases

One-half of all adults do not approve the use of the shopping centers by special interest groups (i.e., groups on one side or the other of some public issue). Somewhat over a third (38 percent) support the use of the centers by these groups, and one-tenth of all respondents are undecided as to how they feel on the issue. There is some perhaps unexpected evidence that men are more in opposition than women to the presence of special interest groups in shopping centers.

* All differences specifically cited in this report between types of respondents are statistically significant.

Q-6b. Do you feel these special interest groups should or should not be allowed to ask for signatures on petitions in shopping centers?

Sex			Special Interest Groups:
<u>Female</u>	<u>Male</u>	<u>All</u>	<u>Ask for signatures</u>
32%	30%	31%	Should be allowed
66	69	67	Should not be allowed
<u>2</u>	<u>1</u>	<u>2</u>	Depends/Don't know
100%	100%	100%	Total
569	385	954	Number of cases

Opposition against permitting special interest groups to ask for signatures on petitions in shopping centers is strong among Wisconsin's citizens; two-thirds of all adults believe these groups should not be allowed to do this. Men and women are in agreement on this point.

* * *

Q-7 to Q-12. If you were in a shopping center and someone from any of the groups I'll name wanted to discuss the group's views with you personally, how would you feel? For example, would it bother you or not if someone from (THE GROUP NAMED BELOW) wanted to talk to you in the center?

Group	Would (Group) Bother Respondent?				Number of Cases
	Yes	No	Depends	Total	
Q-7. the Boy Scouts	25%	72	3	100%	953
Q-8. a charity or church	41%	55	3	99%	947
Q-9. a service group, like the Lions	31%	65	4	100%	952
Q-10. supporters of a candidate for public office	46%	52	2	100%	953
Q-11. an anti or pro-abortion group	55%	42	3	100%	954
Q-12. an anti or pro-nuclear bomb group	52%	45	3	100%	954

As should be expected from the preceding discussion, the extent to which Wisconsin residents object to the presence of private groups in shopping centers varies according to the nature of the group, but even the Boy Scouts receive some opposition. For example, one-quarter of all adults state that they would be "bothered" if a representative of the Boy Scouts wanted to discuss that group's views with them in a shopping center.

The proportion of those who object to this type of contact in centers increases as the groups change from Boy Scouts to service groups, to charities or churches, to supporters of political candidates. Finally, the presence in shopping centers of groups that represent different positions on abortion or the use of nuclear power would "bother" about one-half of all adults in Wisconsin.

Available data indicate that men and women have very similar views about the extent to which these groups

would or would not interfere with their normal shopping patterns.

Q-13. All in all, would the presence of groups like this in some part of a shopping center cause you to avoid that part of the center, or not?

Q-14. Would it cause you to cut down on your shopping time?

Q-15. . . . to find another shopping center?

Sex by: Would the Presence of Groups Like These in a Shopping Center Cause Respondents to . . .

Response	Avoid that part of the center?			Reduce their shopping time?			Find another shopping center?		
	Female	Male	All	Female	Male	All	Female	Male	All
Yes	36%	40%	38%	22%	27%	24%	20%	29%	23%
No	50	43	47	70	65	68	72	63	68
Depends/ Don't know	14	17	15	8	8	8	8	8	9
Total	100%	100%	100%	100%	100%	100%	100%	100%	100%
Number of cases	570	386	956	569	386	955	569	386	955

The presence of objectionable groups in a shopping center would most likely result in a number of shoppers (38 percent) simply avoiding the groups by avoiding that part of the center where the groups are found. Less likely reactions, given by not quite one-quarter of the respondents, would be either a reduction in total shopping time or even going to a different shopping center where, presumably, the groups are absent.

The tendency for men to react somewhat more negatively than women to the presence of special interest groups in centers is seen again in the above findings. Although the differences by sex are not large, a consistently higher percentage of men than women would take some action to avoid contact with these groups.

* * *

Appendix B

**Extract from: Sacramento Union,
Monday, August 8, 1984**

Masters of name game get bills on the ballot

By Anne Richards

Sacramento Union Capitol Bureau

"If we are given 150 days, we can qualify anything," said Fred Kimball confidently.

Sobering thought, considering Kimball is the premier entrepreneur of the paid signature gatherers.

You can see his troops in the spring of an election year fanning out in the shopping centers and asking for your signature on the latest initiative.

Kimball is one of a group of highly paid, savvy professionals who make up the initiative industry.

For money — ranging up to a million dollars — this interlocking group of businesses will take an issue, run it through a legal and financial gauntlet, and put in on the ballot for approval by California voters.

Whether the issue is lottery or welfare, marijuana or the Peripheral Canal, the initiative entrepreneurs have mastered the tangle of election law, money manipulation and influence gathering needed to make law — the way the client wants it.

Groups using the initiative to legislate have boosted the number of citizen-initiated measures by 600 percent nationwide in the last 15 years, said David Schmidt, editor of "Initiative News Report," which is based in Washington, D.C.

In California alone in 1984, proponents launched 29 initiatives, of which one gained a spot on the June primary ballot and seven will appear on the November ballot.